

## **EXHIBIT 1**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	:	Chapter 11
	:	
	:	Case No. 01-1139 (JKF)
W.R. GRACE & CO. <i>et al.</i> ,	:	(Jointly Administered)
	:	
	:	
Debtors.	:	
	:	
	:	
	:	Related Dkt. Nos. 9301 and 9341

**CERTAIN INSURERS' SUBMISSION IN SUPPORT OF  
REVISED PROPOSED ORDER DENYING INSURERS'  
MOTION FOR ACCESS TO 2019 STATEMENTS AND CLARIFYING  
SCOPE OF PERSONAL INJURY ASBESTOS CLAIMS ESTIMATION**

1. Pursuant to the Court's instructions at the October 24, 2005 omnibus hearing, Certain Insurers<sup>1</sup> have conferred with counsel for the Debtors and other interested parties in an attempt to reach an agreement on a form of order clarifying the scope of personal injury asbestos claims estimation proceedings (the "PI Estimation") and denying insurers' motion for access to certain Rule 2019 information (the "Rule 2019 Motion") (Dkt. 9341). Although complete agreement has not been reached, the parties have narrowed their differences. The purpose of this submission is to provide the Court with a brief summary of the small but significant differences that remain between the Certain Insurers' proposed order (the "Insurers' Proposed Order") and the proposed order that Certain Insurers understand will be jointly submitted by the Debtors, Future Claimants' Representative and Asbestos PI Committee (the "Debtors' Proposed Order"). A copy of the Insurers' Proposed Order is attached hereto as

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<sup>1</sup> Certain Insurers are Certain Underwriters at Lloyd's, London and Certain London Market Companies, Federal Insurance Company, Continental Casualty Company and Continental Insurance Company, Zurich Insurance Company and Zurich International Limited, Allstate Insurance Company, solely as successor-in-interest to Northbrook Excess and Surplus Insurance Company, formerly Northbrook Insurance Company, Travelers Casualty and Surety Company, Royal & SunAlliance, Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America and as successor to CIGNA Specialty Insurance Company (formerly known as California Union Insurance Company), Pacific Employers Insurance Company, Century Indemnity Company, and Central National Insurance Company of Omaha, through its managing general agent, Cravens, Dargan Company, Pacific Coast.

#11006  
11-7-05

Exhibit A. Attached as Exhibit B is a blackline showing the differences between the Insurers' Proposed Order and the Debtors' Proposed Order.<sup>2</sup>

2. In directing the parties to prepare an order, the Court was clear in articulating its dual goals of: (i) avoiding participation by the Debtors' insurers in the PI Estimation, given its limited scope; and (ii) protecting the Debtors' insurers from any adverse inference that may result from their non-participation. Specifically, the Court stated:

I'm not really attempting to resolve the standing issue. What I'm attempting to do is – I'm hearing from all of you that you're only here because you have to be here, but you don't really want to be here. ***I'm attempting to get you out of here in a way that hopefully eliminates the problem that you're trying to solve, which is Fuller Austin says, "Where were you?" You were here.*** The Bankruptcy Court in Fuller Austin didn't have the opportunity to say, "Fine, you're here, but I'm not going to permit you to participate because of the limited scope of the estimation hearing." I have that opportunity, I'm taking advantage of that opportunity. ***I'm denying any requests to participate because the scope of the estimation hearing will be limited to figuring out the trust funding.***

Omnibus Hearing, Sept. 26, 2005, Trans. ("9/26/05 Trans") at 69 (emphasis added).

3. The Insurers' Proposed Order accurately reflects the Court's direction by: (i) declaring that the PI Estimation is solely for determining appropriate funding; (ii) barring the Debtors' insurers from participating in the PI Estimation; (iii) recognizing that, absent this Court's order, the insurers' non-participation could leave them vulnerable to potential unintended adverse effects, with specific reference to the *UNR* and *Fuller-Austin* cases; and (iv) ordering that the fact of the insurers' non-participation in the PI Estimation cannot be used against them in any subsequent proceeding regarding the insurers' rights and/or obligations regarding Asbestos PI Claims.

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<sup>2</sup> As directed by the Court, the Insurers' Proposed Order has been provided to the Debtors' counsel for submission to the Court with a certification of counsel. In this regard, Certain Insurers note that the proposed order previously submitted in time for the October 24, 2005 omnibus hearing also reflected the Court's intent with respect to clarifying the scope of the PI Estimation. However, in an effort to compromise, Certain Insurers have drafted this revised Proposed Order to incorporate language provided by the Debtors and other parties in interest, while still effectuating the Court's intent.

4. While the Debtors' Proposed Order reflects certain of the Court's rulings, it ignores other specific concerns articulated by the Court. In this regard, during the Debtors' numerous representations in open court as to the intended scope of the PI Estimation proceedings, the Debtors did not quarrel with the Court's finding that the insurers are entitled to protection from a *UNR/Fuller-Austin* result. Yet, the Debtors' Proposed Order seems intended to preserve their ability to argue to a subsequent court that the PI Estimation can be used to affect the Debtors' insurers.

5. First, the Debtors' Proposed Order omits any language barring insurers from participation in the PI Estimation, and instead includes a paragraph *permitting* the insurers' participation. *See* Ex. B at 3. This is contrary to the Court's explicit ruling. The Insurers' Proposed Order precludes the Debtors' insurers from participating in PI Estimation, as the Court ruled, and makes it clear that the insurers instead are being directed to "to take our hats and go home." 9/26/05 Trans. at 68.

6. Second, the Debtors' Proposed Order omits language that makes it clear that any findings, conclusions, opinions and orders entered in the PI Estimation "***shall not be used in any manner***" in any insurance coverage litigation, arbitration or other dispute relating to the insurers' rights and obligations. *Compare* Ex. A at 3 (emphasis added) and Ex. B at 3. Omission of this language, as the Debtors propose, could cause later confusion regarding whether the Debtors or any other entity – contrary to the Court's rulings – can use the results of PI Estimation in insurance coverage and related disputes. Moreover, the absence of this phrase from the Debtors' Proposed Order conflicts with the undisputed proposition that the sole purpose of PI Estimation is for determining appropriate funding. The Insurers' Proposed Order, by using

the phrase "shall not be used in any manner," would prevent any persons or entities from attempting to circumvent the clear import of the Court's order in a future proceeding.<sup>3</sup>

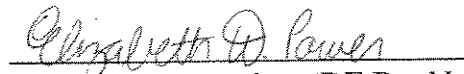
7. In sum, the point of the Court's request for this order was to clarify the scope of the PI Estimation and to protect the insurers from any allegation that the PI Estimation affected their rights and obligations as to Asbestos PI Claims notwithstanding their non-participation in the PI Estimation. The Insurers' Proposed Order reflects this intent.

8. Certain Insurers respectfully request that their form of Proposed Order be entered. Alternatively, should the Court have concerns about the Insurers' Proposed Order, Certain Insurers respectfully request oral argument at the November 14, 2005 omnibus hearing on the issues raised herein before a final order is entered.

Dated: Wilmington, Delaware  
November 7, 2005

Respectfully submitted,

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<sup>3</sup> It is important to note that at the September omnibus hearing, the Court directed anyone who had any objection to the Court's entering an order that would protect insurers from a *UNR/Fuller-Austin* result in the context of PI Estimation to voice their objection at the hearing. The Court specifically inquired whether anyone wanted to use PI Estimation for anything other than determining the amount of funding needed for the Trust. *See* 9/26/05 Trans. at 70. In the ensuing complete silence, neither the Debtors, nor any other interested party including the FCR or the Asbestos PI Committee, raised any other purpose. *Id.*

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## **EXHIBIT A**

INSURERS' PROPOSED ORDER

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	Case No. 01-1139 (JKF)
W.R. GRACE & CO., <i>et al.</i>	:	(Jointly Administered)
	:	
Debtors.	:	
	:	
	:	Related Dkt. No. 9301 and 9341

ORDER DENYING INSURERS' MOTION FOR ACCESS TO EXHIBITS TO 2019  
STATEMENTS AND CLARIFYING SCOPE OF THE PERSONAL INJURY CLAIMS  
ESTIMATION PROCEEDING

WHEREAS, on November 13, 2004, the Debtors filed their Motion for the Entry of an Order Seeking the Estimation of Asbestos Claims and Certain Related Relief (Dkt. No. 6899) (the "Estimation Motion");

WHEREAS, on January 13, 2005, the Debtors filed their Amended Joint Plan of Reorganization (Dkt. No. 7560) (the "Debtors' Plan");

WHEREAS, on August 31, 2005, the Court entered its Case Management Order for the Estimation of Asbestos Personal Injury Liabilities (Dkt. No. 9301), in which the Court fixed the schedule (as may be modified from time to time) for the estimation proceedings to be conducted pursuant to the Estimation Motion with respect to the Debtors' Plan (the "Personal Injury Claims Estimation Proceeding");

WHEREAS, certain parties-in-interest, including certain of the Debtors' insurers, raised objections to the Estimation Motion;

WHEREAS, on September 6, 2005, the Certain Insurers<sup>1</sup> filed a Motion for Access to Exhibits to 2019 Statements (Dkt. No. 9341) (the "2019 Motion"), alleging such information was necessary for their ability to participate in the Personal Injury Claims Estimation Proceeding;

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<sup>1</sup> The Certain Insurers on the 2019 Motion are Federal Insurance Company, Continental Casualty Company and Continental Insurance Company, Zurich Insurance Company and Zurich International Limited, Allstate Insurance Company, solely as successor-in-interest to Northbrook Excess and Surplus Insurance Company, formerly Northbrook Insurance Company, Certain Underwriters at Lloyd's, London and Certain London Market Companies, Travelers Casualty & Surety Company, and Royal & SunAlliance.

INSURERS' PROPOSED ORDER

WHEREAS, on September 16, 2005, Maryland Casualty Company filed a Joinder in Certain Insurers' 2019 Motion (Dkt. No. 9441);

WHEREAS, also on September 16, 2005, various parties filed objections to the 2019 Motion;<sup>2</sup>

WHEREAS, a hearing was held before this Court on September 26, 2005, during which certain of the Debtors' insurers raised concerns regarding the purpose and scope of the Personal Injury Claims Estimation Proceeding, including concerns relating to the *UNR* and *Fuller-Austin* cases<sup>3</sup>;

WHEREAS the Court directed the parties to prepare an order denying the 2019 Motion and clarifying the purpose of the Personal Injury Claims Estimation Proceeding; and

WHEREAS, upon the hearing held on September 26, 2005 (the "Hearing"), and the Court having jurisdiction to consider the foregoing in accordance with 28 U.S.C. §§ 157 and 1334; and venue being proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that due and proper notice of the 2019 Motion has been given, and that no other or further notice need be given; and the Court having determined after due deliberation that denying the 2019 Motion and clarifying the purpose of the Personal Injury Claims Estimation Proceeding is in the best interests of the Debtors' creditors and the estate; and upon all other proceedings had before the Court; and good and sufficient cause appearing therefor, it is hereby

ORDERED that the 2019 Motion is denied, without prejudice; and it is further

ORDERED that the sole issue before the Court in the Personal Injury Claims Estimation Proceeding is the estimation of the Asbestos PI Claims for purposes of determining appropriate funding under the Debtors' Plan, and not for purposes of

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<sup>2</sup> Baron & Budd P.C.'s and Silber Pearlman LLP's Response in Opposition to Certain Insurers' Motion for Access to Exhibits to 2019 Statements (Dkt. No. 9443); Objection of the Official Committee of Asbestos Personal Injury Claimants to the Certain Insurers' Motion For Access to Exhibits to 2019 Statements (Dkt. No. 9449).

<sup>3</sup> See *UNR Indus. v. Continental Cas. Co.*, 942 F.2d 1101 (7th Cir. 1991); *In re Fuller-Austin*, No. BC116835 (Cal. Superior 2002).

INSURERS' PROPOSED ORDER

determining the existence and/or scope of any of the Debtors' insurers' rights and/or obligations regarding Asbestos PI Claims; and it is further

ORDERED that any findings, conclusions, opinions and orders entered in the Personal Injury Claims Estimation Proceeding shall not be binding upon, shall not have any collateral estoppel effect upon, and shall not be used in any manner by any person or entity (including the Debtors, any of the Debtors' insurers, any party participating in the Personal Injury Claims Estimation Proceeding or any other party-in-interest) in any insurance coverage litigation, arbitration or other dispute concerning the existence and/or scope of any of the Debtors' insurers' rights and/or obligations regarding Asbestos PI Claims; and it is further

ORDERED that the fact that the Debtors' insurers do not participate in the Personal Injury Claims Estimation Proceeding shall not be held against any person or entity in any subsequent coverage litigation, arbitration or other dispute concerning the existence and/or scope of any of the Debtors' insurers' rights and/or obligations regarding Asbestos PI Claims; and it is further

ORDERED that this Order addresses only the Personal Injury Claims Estimation Proceeding and does not address issues of standing or participation rights of any person or entity with respect to any other proceedings before this Court; and it is further

ORDERED that this Order shall remain in effect irrespective of whether the Debtors amend the Debtors' Plan or the Debtors or any other party file a new plan of reorganization; and it is further

ORDERED that the Debtors' insurers shall not participate in the Personal Injury Claims Estimation Proceeding (including any discovery or pre-trial proceedings).

Dated: November \_\_\_\_\_, 2005

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Hon. Judith K. Fitzgerald  
United States Bankruptcy Court Judge

## **EXHIBIT B**

INSURERS' PROPOSED ORDER

~~(Joint Order of Debtors, FCR and PI Committee)~~ IN THE UNITED STATES  
BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11  
: Case No. 01-1139 (JKF)  
W.R. GRACE & CO., *et al.* : (Jointly Administered)  
: :  
Debtors. : :  
: :  
: Related Dkt. No. 9301 and 9341

ORDER DENYING INSURERS' MOTION FOR ACCESS TO EXHIBITS TO 2019  
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WHEREAS, on January 13, 2005, the Debtors filed their Amended Joint Plan of Reorganization (Dkt. No. 7560) (the "Debtors' Plan");

WHEREAS, on August 31, 2005, the Court entered its Case Management Order for the Estimation of Asbestos Personal Injury Liabilities (Dkt. No. 9301), in which the Court fixed the schedule (as may be modified from time to time) for the estimation proceedings to be conducted pursuant to the Estimation Motion with respect to the Debtors' Plan (the "Personal Injury Claims Estimation Proceeding");

WHEREAS, certain parties-in-interest, including certain of the Debtors' insurers, raised objections to the Estimation Motion;

WHEREAS, on September 6, 2005, the Certain Insurers<sup>1</sup> filed a Motion for Access to Exhibits to 2019 Statements (Dkt. No. 9341) (the "2019 Motion"), alleging such information was necessary for their ability to participate in the Personal Injury Claims Estimation Proceeding;

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<sup>1</sup> The Certain Insurers on the 2019 Motion are Federal Insurance Company, Continental Casualty Company and Continental Insurance Company, Zurich Insurance Company and Zurich International Limited, Allstate Insurance Company, solely as successor-in-interest to Northbrook Excess and Surplus Insurance Company, formerly Northbrook Insurance Company, Certain Underwriters at Lloyd's, London and Certain London Market Companies, Travelers Casualty & Surety Company, and Royal & SunAlliance.

INSURERS' PROPOSED ORDER

WHEREAS, on September 16, 2005, Maryland Casualty Company filed a Joinder in Certain Insurers' 2019 Motion (Dkt. No. 9441);

WHEREAS, also on September 16, 2005, various parties filed objections to the 2019 Motion;<sup>2</sup>

WHEREAS, a hearing was held before this Court on September 26, 2005, during which certain of the Debtors' insurers raised concerns regarding the purpose and scope of the Personal Injury Claims Estimation Proceeding, including concerns relating to the *UNR* and *Fuller-Austin* cases<sup>3</sup>;

WHEREAS the Court directed the parties to prepare an order denying the 2019 Motion and clarifying the purpose of the Personal Injury Claims Estimation Proceeding; and

WHEREAS, upon the hearing held on September 26, 2005 (the "Hearing"), and the Court having jurisdiction to consider the foregoing in accordance with 28 U.S.C. §§ 157 and 1334; and venue being proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that due and proper notice of the 2019 Motion has been given, and that no other or further notice need be given; and the Court having determined after due deliberation that denying the 2019 Motion and clarifying the purpose of the Personal Injury Claims Estimation Proceeding is in the best interests of the Debtors' creditors and the estate; and upon all other proceedings had before the Court; and good and sufficient cause appearing therefor, it is hereby

ORDERED that the 2019 Motion is denied, without prejudice; and it is further

ORDERED that the sole issue before the Court in the Personal Injury Claims Estimation Proceeding is the estimation of the ~~value of the~~ Asbestos PI Claims for purposes of determining appropriate funding under the Debtors' Plan, and not for purposes of

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<sup>2</sup> Baron & Budd P.C.'s and Silber Pearlman LLP's Response in Opposition to Certain Insurers' Motion for Access to Exhibits to 2019 Statements (Dkt. No. 9443); Objection of the Official Committee of Asbestos Personal Injury Claimants to the Certain Insurers' Motion For Access to Exhibits to 2019 Statements (Dkt. No. 9449).

<sup>3</sup> See *UNR Indus. v. Continental Cas. Co.*, 942 F.2d 1101 (7th Cir. 1991); *In re Fuller-Austin*, No. BC116835 (Cal. Superior 2002).



INSURERS' PROPOSED ORDER

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determining the existence and/or scope of any of the Debtors' insurers' rights and/or obligations regarding Asbestos PI Claims; and it is further

ORDERED that any findings, conclusions, opinions and orders entered in the Personal Injury Claims Estimation Proceeding shall not be binding upon, ~~and shall not have any collateral estoppel effect upon, and shall not be used in any manner by~~ any person or entity ( including the Debtors, any of the Debtors' insurers, any party participating in the Personal Injury Claims Estimation Proceeding or any other party-in-interest) in any insurance coverage litigation, arbitration or other dispute concerning the existence and/or scope of any of the Debtors' insurers' rights and/or obligations regarding Asbestos PI Claims; and it is further

ORDERED that the fact that the Debtors' insurers do not participate in the Personal Injury Claims Estimation Proceeding shall not be held against any ~~party~~person or entity in any subsequent coverage litigation, arbitration or other dispute concerning the existence and/or scope of any of the Debtors' insurers' rights and/or obligations regarding Asbestos PI Claims; and it is further

ORDERED that this Order addresses only the Personal Injury Claims Estimation Proceeding and does not address issues of standing or participation rights of any person or entity with respect to any other proceedings before this Court; and it is further

ORDERED that this Order shall remain in effect irrespective of whether the Debtors amend the Debtors' Plan or the Debtors or any other party file a new plan of reorganization; and it is further

~~ORDERED that the foregoing provisions of this Order shall not apply to any insurer which actually participates in discovery and/or the presentation of evidence~~

ORDERED that the Debtors' insurers shall not participate in the Personal Injury Claims Estimation Proceeding, and each such participating insurer shall be bound by the findings, conclusions, opinions and orders entered in the Personal Injury Claims Estimation Proceeding, (including any discovery or pre-trial proceedings).

INSURERS' PROPOSED ORDER

Dated: November \_\_\_\_\_, 2005

\_\_\_\_\_  
Hon. Judith K. Fitzgerald  
United States Bankruptcy Court Judge

<b>Legend:</b>	
<u>Insertion</u>	
<u>Deletion</u>	
<u>Moved from</u>	
<u>Moved to</u>	
Style change	
Format change	
<u>Moved deletion</u>	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

<b>Statistics:</b>	
	Count
Insertions	13
Deletions	6
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	19